

PERMANENT FORUM, SPECIAL RAPPORTEUR, EXPERT MECHANISM

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The three UN bodies with a specific mandate to deal with indigenous issues – the Forum, the Rapporteur and the Expert Mechanism – have mandates of differing content and origin, the first from the Economic and Social Council (ECOSOC) and the latter two from the Human Rights Council. None of them, however, has been drafted in such a way as to clearly or sufficiently distinguish their tasks. In practice, there may be overlapping and duplication of tasks alongside coordination and mutual promotion. Whether there is overlapping or strengthening (the former to the detriment of and the second to the benefit of the agenda now represented by the Declaration on the Rights of Indigenous Peoples) will depend on the level of understanding between them, beyond what can be found literally in their mandates or within what these permit. In 2007, in addition to their individual mandates, Article 42 of this Declaration added a mandate common to the three bodies and indeed to all UN organs and agencies. This mandate was to ensure respect for the Declaration, to promote its full application and to watch over its effectiveness.

The specific mandate of the Permanent Forum dates from the middle of 2000 and therefore prior to the existence of the Declaration and to the establishment of the Human Rights Council, which resulted in the abolition of the Commission on Human Rights. This temporal location is important for understanding its mandate. It is a truly wide mandate in terms of the issues it expressly covers: economic and social development, culture, environment, education, health and human rights. It is hardly surprising, given that the Commission on Human Rights was then a subsidiary body of the Economic and Social Council, that human rights are included, nor that they form one issue among many others. Since 2000, UN policy has been highlighting the imperative of an over-arching rights-based approach, subjecting all policy to the rule of human rights law. Replacing the subordinate Commission on Human Rights with the Human Rights Council - a body not subordinate to ECOSOC - was in response to this.

Today, human rights come under the jurisdiction not of the Economic and Social Council but of the Human Rights Council. The Forum continues to remain subordinate to the former, from which it receives its mandate, and this mandate maintains a reference to human rights. And the Declaration on the Rights of Indigenous Peoples was careful to specifically mention the Forum when formulating the said mandate in Article 42. Apart from the fact that all UN bodies have to work from a rights-based approach, the Forum is a human rights body and, more concretely, a body for the human rights of indigenous persons, communities and peoples, despite being placed within the orbit of the Economic and Social Council, which is no longer responsible for human rights. It is this very situation that gives the Forum one of its distinctive features. It is as if it were a human rights committee, an indigenous human rights committee, situated institutionally outside the orbit of the Council, the human rights committees and special procedures. This position was not foreseen when its mandate was formulated, but it is quite unequivocally the case now.

The Forum's specific mandate does not refer to the Declaration on the Rights of Indigenous Peoples and nor could it do so, as the Declaration did not exist at that time. It could, of course, have been given the task of promoting the draft Declaration, which was already well advanced, but this process was following its own course, in the hands of the Commission on Human Rights and the ad hoc Group established for this purpose. The Forum's mandate to promote respect for, and the application and effectiveness of, the now adopted Declaration stems from the Declaration itself not from the mention of human rights in its original mandate. If Article 42 of the Declaration had not expressly mentioned the Forum as the target of its mandate it could have been argued that, with human rights now under the jurisdiction of the new Council, which was creating its own mechanisms for indigenous issues, indigenous human rights should not be included as a specialist task within the Forum's remit.

Nor did the concept of the Special Rapporteur on the human rights and fundamental freedoms of indigenous people refer to the Declaration when it was created by the then Commission on Human Rights; again, it could not have done as the Declaration did not exist. Once the Declaration was adopted, doubts were not so much related to the fact that its role, a role focused on human rights, would extend to supervising and promoting the rights stated in the Declaration. The uncertainty lay in its continuity, for it is not a permanent body and it was possible that its role would be considered less necessary once the Declaration was in existence, with its mandate aimed at all UN bodies and agencies. When, in 2007, following the Declaration, the Human Rights Council renewed and re-created the concept of Special Rapporteur, this uncertainty was dissipated. The Rapporteur continues to remain necessary and, moreover, is expressly authorised by the Human Rights Council to promote the Declaration on the Rights of Indigenous Peoples, along with any other international instruments that may contribute to advancing such rights.

This contrasts with the mandate conferred by the Human Rights Council on the Expert Mechanism on the Rights of Indigenous Peoples insofar as, being subsequent to the Declaration, it makes no express reference to it. The Mechanism is established as an advisory body to the Council on the rights of indigenous peoples, to operate in such manner as the latter may request and through, essentially but not exclusively, thematic research. With good judgement, and in accordance with Article 42 of the Declaration, the Mechanism adopted the Declaration as the normative framework for its work at its first session in 2008. The Permanent Forum did the same in its session that same year. The Declaration is the normative framework shared by the three bodies. Its Article 42 represents the common mandate around which they must coordinate and cooperate.

The Special Rapporteur has the most detailed specific mandate with regard to addressing the possibilities and difficulties of the full application and effective protection of the human rights and fundamental freedom of indigenous persons: gathering, receiving and exchanging information on violations of such rights and freedoms with government and indigenous parties; formulating recommendations and proposals to prevent them; developing a constructive dialogue with all parties, including UN bodies and agencies at all levels and, in particular, with the Permanent Forum and with the other special procedures of the Human Rights Council and with the human rights committees, the treaty bodies, as well as the regional human rights organisations; taking responsibility for recommendations from conferences, summits and other UN meetings and the observations of the above stated committees... The Human Rights Council requires that, when performing its tasks, it avoids duplicating the tasks of other UN bodies and agencies.

The original mandate of the Permanent Forum refers to the task of providing advice and making recommendations on indigenous issues to the Economic and Social Council as well as, through this latter, to the United Nations' programmes, funds and agencies; to preparing and disseminating information on such issues; to raising awareness around and promoting the integration and coordination of activities relating to indigenous issues throughout the whole UN system. Today, the Forum's integrative and coordinating role can be more directly understood with reference to the Special Rapporteur and Expert Mechanism, so that the three bodies can, within the normative framework of the Declaration on the Rights of Indigenous Peoples, harmonise their work in order to achieve integration and coordination within and across the whole spectrum of the UN system.

The mandates of both the Forum and the Mechanism stipulate the attendance of the other bodies, the Rapporteur included, at their ordinary meetings. This is something that should be encouraged: the presence of the Rapporteur should be incorporated more actively and fully into the Forum's sessions and the Mechanism should also be represented there. In addition, the Rapporteur and corresponding representation from the Forum should be present at the sessions of the Expert Mechanism. In addition to the Rapporteur's specific tasks, these offer opportunities for him to maintain more global contact with both governmental and indigenous representatives. A mechanism should be found to enable the Rapporteur to form part of the ordinary sessions of both the Forum and the Mechanism.

Relations with the agencies are also stipulated and their involvement in both the Forum's and the Mechanism's sessions is anticipated. This is highly advisable given the context of their work. The establishment and functioning of the Inter-Agency Support Group on Indigenous Peoples' Issues (IASG) makes matters much easier, even though it still does not include all agencies whose work affects indigenous peoples. It was created prior to the Declaration, as a support mechanism for the Forum and Rapporteur, something that should perhaps be reconsidered. Following the Declaration, neither the Forum, the Rapporteur nor the Mechanism need such an expression of support, as they are now bound by virtue of Article 42, while the UN agencies in particular now need guidance and coordination on indigenous issues because of the Declaration, something that is above all the responsibility of the Forum. Constant scrutiny should be considered its responsibility because part of its mandate is to integrate and coordinate indigenous issues within the UN system, and this should be conducted through periodical reviews of the agencies' activities, particularly at local level, insofar as they affect indigenous peoples in the light of the Declaration's requirements.

The human rights committees, the treaty bodies, are also organs of the UN system, and their work is truly important in terms of the rights of indigenous persons, communities and peoples. The Forum is still responsible for general coordination and awareness raising while the Rapporteur is entrusted more specifically with maintaining dialogue with the committees. For the former, some formal channel should be found, such as the Forum President's attendance at conferences of committee chairs or the Forum's formulation of observations or comments on indigenous rights in accordance with the Declaration, aimed at the relevant committee or committees. The anticipated formation, within the Forum, of a task team on the Declaration's rights may help to open up the necessary dialogue where appropriate, or broaden it and develop it not only with governments but also with the agencies and committees.

There remains the crucial issue of the Universal Periodic Review of States by the Human Rights Council and, in this regard, there is no specific provision for the

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direct involvement of any of the three bodies, not the Forum, the Rapporteur nor even the Expert Mechanism, which advises the Council itself. To date, there has been insufficient and sporadic attention to this matter. As the procedure arises, the three bodies will need to consider how they can have an impact through the Inter-Agency Support Group and the Office of the High Commissioner for Human Rights. Other challenges will also need to be confronted by the three bodies jointly. Given the financial implications, it will not be necessary to institutionalise an annual coordinating meeting between the three bodies; their attendance at the sessions of the Forum and Mechanism could be used for the purposes of coordination and promotion, always based on ground that is common not only to them but to everyone, the Declaration on the Rights of Indigenous Peoples.